

## The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

STATE OF WASHINGTON; STATE OF CONNECTICUT; STATE OF MARYLAND; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF OREGON; COMMONWEALTH OF MASSACHUSETTS; COMMONWEALTH OF PENNSYLVANIA; DISTRICT OF COLUMBIA; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF IOWA; STATE OF MINNESOTA; STATE OF NORTH CAROLINA; STATE OF RHODE ISLAND; STATE OF VERMONT and COMMONWEALTH OF VIRGINIA,

NO. 2:18-cv-01115-RSL

**PLAINTIFF STATES' MOTION TO  
SUPPLEMENT THE  
ADMINISTRATIVE RECORD**

**NOTE FOR CONSIDERATION:  
DECEMBER 21, 2018<sup>1</sup>**

### **Plaintiffs.**

V.

UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as Secretary of State; DIRECTORATE OF DEFENSE TRADE CONTROLS; MIKE MILLER, in his official capacity as Acting Deputy Assistant Secretary of Defense Trade Controls; SARAH HEIDEMA, in her official capacity as Director of Policy, Office of Defense Trade Controls Policy; DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION, INC.; AND CONN WILLIAMSON.

### Defendants.

<sup>1</sup> See Dkt. # 115 (Case Management Order) at p. 2, n.1.

## I. INTRODUCTION

This lawsuit challenges two highly unusual administrative actions: a “Temporary Modification” removing from the United States Munitions List computer files for the automatic production of 3D-printed firearms, and a Letter approving such files for “unlimited distribution.” The Temporary Modification and Letter are not the fruits of a public rulemaking process, but were “based on a settlement of litigation”<sup>2</sup> with the Private Defendants in the matter of *Defense Distributed v. U.S. Dep’t of State*, Case No. 15-cv-372-RP (W.D. Tex.)—absent any formal published rule, and as a *fait accompli* before the comment period in a related rulemaking effort had closed. The settlement agreement marked a reversal of the Federal Defendants’ previous position (held as recently as April 6, 2018) that 3D-printed gun files are subject to export control and that the government had a “very strong public interest” in preventing their dissemination online for reasons of “national defense and national security.”<sup>3</sup>

The Federal Defendants claim the Temporary Modification and Letter were part of a broad regulatory reform effort that began in 2010.<sup>4</sup> But that is belied by the sudden 180-degree reversal of position, and is unsupported by anything in the filed Administrative Record (Dkt. # 116). The filed record contains *no* documents that could conceivably support the 2018 reversal, and *no* documents explaining or substantiating the *post hoc* assertions in the Declaration of Sarah Heidema on which the Federal Defendants relied at the preliminary injunction phase. Rather, the filed record consists mostly of thousands of formulaic public comments opposing an unrelated 2015 proposed rule that never went into effect. The filed record also contains scant, cherry-picked portions of the record in the Texas case and Fifth Circuit appeal, but excludes key briefing

<sup>2</sup> Dkt. # 49 (Fed. Defs' Opp. to Mot. to Compel Production of Admin. Record) at p. 5.

<sup>3</sup> Dkt. # 44-1, Ex. 4 (Government's Mot. to Dismiss) at pp. 6-7.

<sup>4</sup> See Dkt. # 64 (Fed. Defs' Opp. to Mot. for PI) at p. 5, n.1.

1 and evidence from those proceedings, as well as other information related to the State  
 2 Department's multiple years of "consistent[] and reasonabl[e]"<sup>5</sup> regulation of 3D-printed gun  
 3 files. The filed record does not even include records related to the Federal Defendants' own  
 4 commodity jurisdiction (CJ) determination on the very files at issue.

5 The Plaintiff States request that the Court order the Federal Defendants to supplement  
 6 the filed record to include *all* documents on which they directly or indirectly relied in deciding  
 7 to deregulate 3D-printed gun files—including documents related to the settlement of the Texas  
 8 case; all substantive briefing, orders, and record evidence in that case; all documents related to  
 9 the CJ determinations regarding Defense Distributed's files; any other missing parts of the record  
 10 before the decisionmakers; and a privilege log. Judicial review must be based on the "whole"  
 11 record—not just the cherry-picked portions the agency likes best.

## 12       **II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

### 13       **A. Overview of the Challenged Agency Actions**

14 The States challenge the Federal Defendants' "Temporary Modification"<sup>6</sup> removing  
 15 Defense Distributed's files and a broad range of "Other Files" from the U.S. Munitions List, as  
 16 well as their Letter<sup>7</sup> advising that Defense Distributed's files were "approved for public release  
 17 (i.e., unlimited distribution)" and exempt from export regulation. The States allege that these  
 18 two actions are invalid under the Administrative Procedure Act (APA) because they are *ultra*  
 19 *vires*, contrary to law, and arbitrary and capricious.<sup>8</sup>

### 20       **B. History of the Government's Regulation and Deregulation of the Files**

21 In late 2012, Defense Distributed posted online certain Computer Aided Design (CAD)

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22       <sup>5</sup> Dkt. # 44-1, Ex. 4, at p. 7.

23       <sup>6</sup> Dkt. # 29-1, Ex. 7 (Temporary Modification of Category I of the United States Munitions List).

24       <sup>7</sup> Dkt. # 44-1, Ex. 7 (Letter dated July 27, 2018).

<sup>8</sup> Dkt. # 29 (FAC) ¶¶ 218–240.

1 files that could be used to automatically manufacture the “Liberator” pistol and other 3D-printed  
 2 weapons.<sup>9</sup> A letter from the State Department’s Directorate of Defense Trade Controls  
 3 enforcement division prompted Defense Distributed to take down the files and initiate several  
 4 CJ procedures pursuant to 22 C.F.R. § 120.4, which ultimately determined that some but not all  
 5 of the files were subject to export control regulation.<sup>10</sup> Defense Distributed sued the government,  
 6 claiming that the CJ procedures and prior authorization requirement were unlawful. *Defense*  
 7 *Distributed v. U.S. Dep’t of State*, Case No. 15-cv-372-RP (W.D. Tex.).

8 Defense Distributed moved for a preliminary injunction in the Texas case, which the  
 9 government opposed on the grounds that posting the files online “could cause serious harm to  
 10 U.S. national security and foreign policy interests,” as described at length in the declaration of  
 11 then-Director of the Office of Defense Trade Controls Management, Lisa V. Aguirre.<sup>11</sup> The  
 12 district court denied Defense Distributed’s motion, and the Fifth Circuit affirmed.<sup>12</sup>

13 On April 6, 2018, the government moved to dismiss Defense Distributed’s lawsuit,  
 14 reiterating that what was at stake was its “ability to control the export of weapons – a system of  
 15 laws and regulations that seeks to ensure that articles useful for warfare or terrorism are not  
 16 shipped from the United States to other countries (or otherwise provided to foreigners) without  
 17 authorization, where, beyond the reach of U.S. law, they could be used to threaten U.S. national  
 18 security, U.S. foreign policy interests, or international peace and stability.”<sup>13</sup>

19 By April 20, 2018, the government had reached a settlement with Defense Distributed,  
 20 pursuant to which it reversed its position on 3D-printed gun files and agreed to pursue a  
 21

22 <sup>9</sup> Dkt. # 43 (Mot. for PI) at pp. 2–3; Dkt. # 64 (Fed. Defs’ Opp.) at p. 4; Dkt. # 95 (Order) at p. 3.

23 <sup>10</sup> Dkt. # 43 at pp. 3, 15; Dkt. # 64 at p. 4; Dkt. # 95 at p. 4.

24 <sup>11</sup> Dkt. # 29-1, Ex. 4 (Aguirre Decl.); Dkt. # 43 at pp. 3, 15–16; Dkt. # 44-1, Ex. 3 (Govt Opp. to Mot. for  
 PI); Dkt. # 95 at pp. 4–5.

<sup>12</sup> Dkt. # 95 at p. 5.

<sup>13</sup> *Id.* at 5–6 (citing *Defense Distributed v. U.S. Dep’t of State*, C15-0372RP, Dkt. # 92 at p. 1 (W.D. Tex)).

rulemaking effort to narrow Category I of the Munitions List, and in the meantime, to enact the Temporary Modification and issue the Letter permitting the files to be published online immediately.<sup>14</sup> On May 24, 2018, the State and Commerce Departments published two notices of proposed rulemaking (NPRM) in the Federal Register, proposing to remove all non-automatic firearms up to .50 caliber and related “technical data” from Category I, and to exempt technical data posted online from any regulation.<sup>15</sup> The stated purpose was to loosen regulation of firearms “widely available for commercial sale.”<sup>16</sup> Neither NPRM mentions 3D-printed firearm files.<sup>17</sup>

The settlement agreement was signed on June 29, but was not made public until July 10, 2018—one day after the NPRM comment period closed.<sup>18</sup> On July 27, 2018, the Directorate published the Temporary Modification and issued the Letter,<sup>19</sup> prompting this lawsuit.

Even though the NPRM did not mention 3D-printed gun files, many public comments made by July 9 expressed concern that removing small-caliber firearms from the Munitions List would remove 3D-printed firearm files from the State Department’s jurisdiction entirely.<sup>20</sup>

#### **C. Relevant Procedural History in This Case**

On July 30, 2018, the Plaintiff States filed their complaint and a motion for a temporary restraining order (TRO) in this case, seeking to enjoin the Federal Defendants from implementing or enforcing the Temporary Modification and Letter.<sup>21</sup> On July 31, 2018, the Court issued a TRO, and the Federal Defendants represented that they complied by removing the Temporary Modification from the Directorate’s website and rescinding the Letter.<sup>22</sup>

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<sup>14</sup> Dkt. # 95 at p. 6; Dkt. # 43 at p. 4; Dkt. # 64 at pp. 5–6.

<sup>15</sup> 83 Fed. Reg. 24,198 (May 24, 2018); 83 Fed. Reg. 24,166 (May 24, 2018).

<sup>16</sup> 83 Fed. Reg. 24,198 (May 24, 2018).

<sup>17</sup> 83 Fed. Reg. 24,198 (May 24, 2018); 83 Fed. Reg. 24,166 (May 24, 2018).

<sup>18</sup> Dkt. # 95 at p. 7; Dkt. # 43 at pp. 4–5.

<sup>19</sup> Dkt. # 95 at p. 7.

<sup>20</sup> See <https://www.regulations.gov/docket?D=DOS-2017-0046>.

<sup>21</sup> Dkt. ## 1, 2. The States amended their complaint on August 2, 2018. Dkt. # 29.

<sup>22</sup> Dkt. # 23 (Order); Dkt. # 43 at p. 5, n.19.

On August 7, 2018, the States moved to compel production of the administrative record on an expedited basis so that the Court could consider it in adjudicating their motion to convert the TRO to a preliminary injunction.<sup>23</sup> In opposing the motion, the Federal Defendants described the administrative record as being “based on a settlement of litigation, which in turn occurred in the context of a nearly decade-long effort to comprehensively reform export regulations,” citing a 2010 White House “Fact Sheet” which explains that a key goal of the reform effort was to “enhance U.S. national security” by updating the Cold War-era export control system.<sup>24</sup>

On August 13, 2018, the Court ruled that “[t]he record of the decision-making process that led to the temporary and/or permanent revision of the United States Munitions List . . . to allow the distribution instructions for the automated production of 3-D printed weapons is undoubtedly relevant to plaintiffs’ argument that the decision was arbitrary and capricious,” but declined to order its production on an expedited basis.<sup>25</sup> On August 27, 2018, the Court issued a preliminary injunction, noting that rather than producing the administrative record, the Federal Defendants relied on the August 15, 2018 Declaration of Sarah Heidema “to explain how and why the decision was made to reverse the CJ determination regarding the CAD files at issue.”<sup>26</sup>

## D. The Filed Administrative Record

The Administrative Record filed by the Federal Defendants contains no information related to the Directorate's enforcement efforts regarding 3D-printed gun files, Defense Distributed's CJ requests, or the CJ determinations.<sup>27</sup> It contains almost no documents from 2018, when the challenged agency decisions were made, such as communications or other

23 Dkt. # 34.

<sup>24</sup> Dkt. # 48 at p. 5 & n.1.

<sup>25</sup> Dkt. # 52 (Order) at p. 1.

<sup>26</sup> Dkt. # 95 (Order) at p. 13, n.7 (citing Dkt. # 64-1 (Heidema Decl.)).

<sup>27</sup> See generally Declaration of Jennifer D. Williams (J. Williams Decl.); Dkt. # 116 (Admin. Record).

documents related to the settlement of the Texas case, or any other documents relating to or explaining the Temporary Modification and Letter (other than near-final drafts of those documents).<sup>28</sup> It contains no privilege log or other record of withheld documents.<sup>29</sup>

The filed record includes some portions of the record in the Texas case—the district court’s order denying the preliminary injunction, the Fifth Circuit’s opinion upholding the denial, and four of the seven amicus briefs filed on appeal—but it excludes the parties’ trial and appellate briefing, record evidence from those proceedings such as the Aguirre Declaration and its exhibits, and documents related to the CJ determinations.<sup>30</sup> It includes a 2015 NPRM proposing a new definition of “technical data” that never went into effect, along with thousands of comments opposing the 2015 NPRM (but none in favor)—but it excludes the published NPRMs from May 2018 and all comments on the 2018 NPRMs.<sup>31</sup>

### III. ARGUMENT

#### A. Legal Standard

Judicial review of an agency decision “is based on the administrative record and the basis for the agency’s decision must come from the record.” *Ass’n of Irritated Residents v. E.P.A.*, 790 F.3d 934, 942 (9th Cir. 2015). Review is based on “the whole record.” 5 U.S.C. § 706. The “whole” record “consists of all documents and materials directly or *indirectly* considered by the agency decision-makers and includes evidence contrary to the agency’s position.” *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). “[T]he whole record is not necessarily those documents that the agency has compiled and submitted as ‘the’ administrative record; the court must look to all the evidence that was before the decision-making body.” *Pub. Power*

<sup>28</sup> See generally J. Williams Decl.; id. ¶¶ 4(13), 4(14).

<sup>29</sup> See generally J. Williams Decl.

<sup>30</sup> See *id.*

<sup>31</sup> J. Williams Decl. ¶¶ 4(4), 4(16); compare 80 Fed. Reg. 31,534 (2015 proposed definition of “technical data” in 22 C.F.R. § 120.10) with 22 C.F.R. § 120.10 (current version).

1     *Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (internal quotation marks omitted). “An  
 2 incomplete record must be viewed as a fictional account of the actual decisionmaking process.”

3     *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).

4       Furthermore, “certain circumstances may justify expanding review beyond the record or  
 5 permitting discovery.” *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988).  
 6 Courts may consider extra-record evidence when, *inter alia*: (1) admission is necessary to  
 7 determine whether the agency has considered all relevant factors and has explained its decision;  
 8 (2) the agency has relied on documents not in the record; or (3) plaintiffs make a showing of  
 9 agency bad faith. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir.  
 10 2014); *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). “These limited exceptions  
 11 operate to identify and plug holes in the administrative record.” *Lands Council*, 395 F.3d at 1030.

12     **B.     The Federal Defendants Failed to Provide the Whole Administrative Record**

13       **1.     The filed Administrative Record excludes final versions of key documents**

14       The filed record contains only non-final versions of the settlement agreement,  
 15 2018 NPRM, Temporary Modification, and Letter. *See* J. Williams Decl. ¶¶ 4(11), (13)–(15). To  
 16 the extent judicial review would be “effectively frustrate[d]” by the absence of the final,  
 17 operative versions of these documents, they should be included in the filed record. *Animal Def.*  
 18 *Council*, 840 F.2d at 1436. Further, as discussed below, the filed record also excludes many key  
 19 documents entirely, such as records of the CJ procedures and filings in the Texas case.

20       **2.     The filed record contains no meaningful settlement-related documents**

21       The Federal Defendants acknowledge that their reversal of position on 3D-printed gun  
 22 files was “based on a settlement of litigation,” and the evidence strongly suggests that they made  
 23 this decision sometime in April 2018—after the Federal Defendants moved to dismiss the Texas  
 24 case, and before they reached a settlement a few weeks later. Yet the filed record contains *no*

1     documents whatsoever from that critical time period, leaving the States and the Court unable to  
 2 evaluate the basis for the reversal and determine whether it was arbitrary and capricious.<sup>32</sup> The  
 3 only documents in the filed record that appear to be from 2018 are the not-quite-final versions  
 4 of the settlement agreement, NPRM, Temporary Modification, and Letter referenced above.

5                 It is impossible to know exactly what settlement-related documents have been improperly  
 6 excluded from the filed record, but they almost certainly include communications between the  
 7 Federal and Private Defendants during their negotiations. Naturally, any communications and  
 8 documents exchanged with the Private Defendants are not privileged, since they were not  
 9 maintained in confidence. *See, e.g., Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114,  
 10 1117 (9th Cir. 1988) (deliberative process privilege protects government consultative functions  
 11 by "maintaining the confidentiality" of intra-agency documents); Greenwald *et al.*, 1 Testimonial  
 12 Privileges § 1:82 (3d ed.) ("To become privileged, a communication must be made in confidence.  
 13 To stay privileged, the communication must remain confidential.").

14                 To the extent the Federal Defendants are withholding any settlement-related or other  
 15 documents on grounds of privilege, they should be required to submit a privilege log. While the  
 16 Ninth Circuit has not definitively established when agency production of a privilege log is  
 17 required or appropriate, it recently held that requiring a privilege log was not clear error and  
 18 observed that "many district courts within this circuit have required a privilege log and *in camera*  
 19 analysis of assertedly deliberative materials in APA cases." *In re United States*, 875 F.3d 1200,  
 20 1210 (9th Cir. 2017), vacated on other grounds, 138 S. Ct. 443 (2017); *see also, e.g., S.F. Bay*  
 21 *Conservation & Dev. Comm'n v. U.S. Army Corps of Eng'rs*, No. 16-cv-05420-RS(JCS), 2018  
 22 WL 3846002, at \*6–7 (N.D. Cal. Aug. 13, 2018). Notably, the Federal Defendants' Certification  
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24                 <sup>32</sup> See generally J. Williams Decl.; *see* Dkt. # 95 at pp. 16–18; Dkt. # 43 at pp. 15–17.

1 of the Administrative Record includes a wildly overbroad definition of “privileged documents,”  
 2 incorrectly asserting that this category includes all “documents in draft format” and all  
 3 “recommendation memoranda”—evidently regardless of whether they are privileged  
 4 communications or work product. Dkt. # 116 (Certification) ¶ 4. A privilege log that complies  
 5 with Rule 26(b)(5)(A) is necessary to determine whether any withheld documents are actually  
 6 privileged. Indeed, it is especially necessary here because the State Department has placed  
 7 potentially privileged documents directly at issue by citing the Department of Justice’s advice  
 8 as the real reason for its reversal of position.<sup>33</sup> *Cf. Regents of the Univ. of Cal. v. U.S. Dep’t of*  
 9 *Homeland Sec.*, --- F.3d ----, 2018 WL 5833232, at \*14 (9th Cir. Nov. 8, 2018) (examining  
 10 substance of U.S. Attorney General’s advice as evidence of true basis for agency action).

11       **3. The filed record excludes other documents before the decision-making body**

12       In addition to entirely excluding key settlement-related documents, the filed record  
 13 contains only scant, cherry-picked portions of the record from the Texas case that plainly do not  
 14 comprise “all the evidence that was before the decision-making body,” *Pub. Power Council*,  
 15 674 F.2d at 794.<sup>34</sup> Conspicuously absent are:

- 16       • The briefs filed at the trial and appellate levels in the Texas case, including the  
     17 Federal Defendants’ 2018 motion to dismiss reflecting their pre-reversal position that  
     3D-printed gun files pose a national security threat and are subject to ITAR;<sup>35</sup>
- 18       • Evidence submitted in the Texas proceedings, including the 2015 Aguirre declaration  
     19 describing the national and global security risks associated with disseminating the  
     files online and attaching numerous exhibits;<sup>36</sup> and
- 20       • Documents related to the 2015 CJ determinations, which were at the heart of the  
     21 Texas case and were attached to the Aguirre declaration.<sup>37</sup>

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22       <sup>33</sup> Dkt. # 43 at p. 16; Dkt. # 35-1, Ex. A (July 31, 2018 State Department Press Briefing) at p. 4 of 19.

23       <sup>34</sup> The *only* records related to the Texas case in the filed record are a single order from the Texas district  
     court; the Fifth Circuit’s opinion; and four of the seven amicus briefs filed on appeal (all supporting Defense  
     Distributed). J. Williams Decl. ¶ 4(9) and Ex. 1.

24       <sup>35</sup> Dkt. # 44-1, Ex. 4.

25       <sup>36</sup> Dkt. # 29-1, Ex. 4.

26       <sup>37</sup> Dkt. # 29-1, Ex. 4, Exs. 2–6.

1       These missing documents are as much a part of the rulemaking record as the documents  
 2 the Federal Defendants say they relied on directly. *See Pub. Power Council*, 674 F.2d at 794;  
 3 *Thompson*, 885 F.2d at 555 (the “whole” record includes all documents “directly or *indirectly*  
 4 considered”); *Trout Unlimited v. Lohn*, No. C05-1128C, 2006 WL 1207901, at \*3 (W.D. Wash.  
 5 May 4, 2006) (“documents that were *not* relied upon by a decisionmaker, or evidence relating to  
 6 such documents and their non-consideration, have been held to be necessary elements of an  
 7 administrative record”).<sup>38</sup> This Court appropriately relied on many of these now-missing  
 8 documents in issuing a permanent injunction. *See Dkt. # 95 at pp. 3–6, 17–18, 20.*

9       The Federal Defendants also cherry-picked public comments that support their position,  
 10 while ignoring comments that are “contrary to the agency’s position.” *Thompson*, 885 F.2d at  
 11 555. The filed record contains thousands of public comments opposed to a 2015 NPRM that  
 12 never became final, which proposed a revised definition of “technical data” for purposes of the  
 13 Munitions List that never went into effect. But the filed record excludes the published 2018  
 14 NPRMs *and* the thousands of public comments that were submitted in response. To be sure, not  
 15 all comments on the 2018 NPRMs were before the Federal Defendants at the time they decided  
 16 to settle the Texas case. But they are properly part of the record because the Federal Defendants  
 17 have since sought to use the 2018 NPRM as a cloak for their covert deregulation of 3D-printed  
 18 gun files.<sup>39</sup> Moreover, the comment period *had* closed by the time the Federal Defendants took  
 19 the challenged administrative actions on July 27. If indeed the 2018 NPRM is at all relevant to  
 20 the actions challenged here, the comments on the NPRM that were before the agency when it  
 21 enacted the Temporary Modification and Letter are part of the “whole” administrative record.

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23       <sup>38</sup> Alternatively, the Court should at least take judicial notice of and consider these documents as  
 24 extra-record evidence, as they are documents the agency “has relied on” or that are “necessary to determine whether  
 the agency has considered all relevant factors.” *Locke*, 776 F.3d at 992.

25       <sup>39</sup> *See Dkt. # 64 at pp. 6–7, 12, 22, 23.*

1           **4. The filed record fails to substantiate the Heidema Declaration**

2           Courts may consider documents outside the filed record “when it appears the agency has  
 3 relied on documents or materials not included in the record.” *Animal Def. Council*, 840 F.2d at  
 4 1436. Review of agency action includes “those grounds upon which the record discloses that the  
 5 agency’s action was based.” *Turlock Irrigation Dist. v. Fed. Energy Regulatory Comm’n*,  
 6 903 F.3d 862, 868 (9th Cir. 2018) (citations and internal markings omitted).

7           The Federal Defendants have defended their reversal of positon by asserting that they  
 8 “determined” that the NPRM’s proposed revision of Category I of the Munitions List “would  
 9 not injure the national security interests of the United States,” citing the Heidema Declaration  
 10 they filed at the preliminary injunction phase of these proceedings. Dkt. # 64 (citing Heidema  
 11 Decl. (Dkt. # 64-1) ¶ 19). The Heidema Declaration makes several unfounded assertions that  
 12 find no basis in the filed record. *See, e.g.*, Dkt. # 64-1 ¶ 19 (stating that the 2018 NPRM was  
 13 “informed by DoD’s assessment that the items proposed for transfer are already commonly  
 14 available”); ¶ 20 (stating that the items to be removed from the Munitions List are those “widely  
 15 available for commercial sale”); ¶ 31 (stating that the State Department “requested and received  
 16 concurrence from DoD . . . before sending the [L]etter”); *see generally* J. Williams Decl.  
 17 (summarizing all documents in the filed record). In short, based on the filed record, there is still  
 18 “no indication that the Department considered the unique properties of 3D plastic guns” when it  
 19 authorized 3D-printed firearm files to be posted on the internet. Dkt. # 95 at p. 17.

20           The Federal Defendants cannot rely on the Heidema Declaration alone, since “[t]he focal  
 21 point for judicial review should be the administrative record already in existence, not some new  
 22 record made initially in the reviewing court.” *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729,  
 23 743 (1985); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014)  
 24 (same). To the extent there are any contemporaneous records supporting the *post hoc* statements

1 in the Heidema Declaration regarding the basis for the Federal Defendants' "determination,"  
 2 they are part of the "whole" record and must be included.

3 **C. Extra-Record Discovery May Be Warranted Based on Evidence of Bad Faith**

4 Should this motion be granted, the Plaintiff States respectfully reserve their right to seek  
 5 discovery as needed to establish the record's completeness, if any question remains after  
 6 supplementation. While the Court may not need to decide the issue if supplementation renders  
 7 the record complete, the States note that agency bad faith may warrant extra-record discovery.

8 *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), abrogated on other  
 9 grounds by *Califano v. Sanders*, 430 U.S. 99 (1977); *Pub. Power Council*, 674 F.2d at 795  
 10 (courts should "go beyond the agency record when agency bad faith is claimed"); *Portland*  
 11 *Audubon Soc'y*, 984 F.2d at 1548 (upon a "showing of impropriety in the process" creating an  
 12 "appearance of irregularity," courts should not rely on the "so-called 'record'" the agency filed).  
 13 Even absent bad faith, when a "failure to explain agency action effectively frustrates judicial  
 14 review, the court may 'obtain from the agency, either through affidavits or testimony, such  
 15 additional explanation of the reasons for the agency decision as may prove necessary.'" *Animal*  
 16 *Def. Council*, 840 F.2d at 1436 (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)).

17 Here, the process of deregulating 3D-printed gun files via a Temporary Modification and  
 18 private Letter, with no advance notice and no opportunity for public comment, was "irregular"  
 19 to say the least. The real reason for the Federal Defendants' actions remains unexplained by the  
 20 deficient filed record as it currently stands. If any question as to the record's completeness or the  
 21 reasons for the actions remains after supplementation, extra-record discovery may be warranted.

22 **IV. CONCLUSION**

23 For the reasons above, the Plaintiff States respectfully request that the Court grant their  
 24 motion and require the Federal Defendants to supplement the administrative record.

1 DATED this 15th day of November, 2018.

2 ROBERT W. FERGUSON  
3 Attorney General

4 /s/ Jeffrey Rupert  
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***Pro Hac Vice* motions forthcoming for all  
counsel of record not barred in the Western  
District of Washington**

1                   **DECLARATION OF SERVICE**

2                   I hereby certify that on November 15, 2018, I caused the foregoing document to be  
3 electronically filed with the Clerk of the Court using the CM/ECF system, which will serve a  
4 copy of this document upon all counsel of record.

5                   DATED this 15th day of November, 2018, at Seattle, Washington.

6                   \_\_\_\_\_  
7                   */s/ Jeffrey Rupert* \_\_\_\_\_  
8                   JEFFREY RUPERT

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	The Honorable Robert S. Lasnik
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5	<p style="text-align:center"><b>UNITED STATES DISTRICT COURT</b></p> <p style="text-align:center"><b>WESTERN DISTRICT OF WASHINGTON</b></p> <p style="text-align:center"><b>AT SEATTLE</b></p>
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8	STATE OF WASHINGTON; STATE OF CONNECTICUT; STATE OF MARYLAND; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF OREGON;
9	COMMONWEALTH OF
10	MASSACHUSETTS; COMMONWEALTH OF PENNSYLVANIA; DISTRICT OF
11	COLUMBIA; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF
12	DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF IOWA; STATE
13	OF MINNESOTA; STATE OF NORTH CAROLINA; STATE OF RHODE ISLAND;
14	STATE OF VERMONT and COMMONWEALTH OF VIRGINIA,
15	
16	Plaintiffs, v.
17	UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as Secretary of State; DIRECTORATE OF DEFENSE TRADE CONTROLS; MIKE MILLER, in his official capacity as Acting Deputy Assistant Secretary of Defense Trade Controls; SARAH HEIDEMA, in her official capacity as Director of Policy, Office of Defense Trade Controls Policy; DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION, INC.; AND CONN WILLIAMSON,
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23	Defendants.
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1        This matter came before the Court on the Plaintiff States' Motion to Supplement the  
 2 Administrative Record. The Court has considered all briefing on the motion and documents filed  
 3 therewith, including declarations and exhibits; the arguments of counsel; the Administrative  
 4 Record filed by the Federal Defendants; and the entire record in this case.

5        Having considered the foregoing, the Court finds that the filed Administrative Record  
 6 does not contain "all the evidence that was before the decision-making body" when the Federal  
 7 Defendants took the administrative actions challenged herein. *Pub. Power Council v. Johnson*,  
 8 674 F.2d 791, 794 (9th Cir. 1982). The Federal Defendants are hereby ordered to supplement  
 9 the filed Administrative Record with the following information:

10        1.        All documents related to the settlement of the matter of *Defense Distributed v. U.S. Dep't of State*, Case No. 15-cv-372-RP (W.D. Tex.), including but not limited to communications  
 11 and documents exchanged between the Federal and Private Defendants in connection with the  
 12 negotiation of that settlement and any documents establishing or explaining the reason(s) for the  
 13 Federal Government's agreement to reverse its position on the regulation of 3D-printed firearm files.

14        2.        The complete record in the matter of *Defense Distributed v. U.S. Dep't of State*, Case  
 15 No. 15-cv-372-RP (W.D. Tex.) and the related appeal to the Fifth Circuit, including but not  
 16 necessarily limited to all substantive briefing, orders, and record evidence in those proceedings.

17        3.        All documents related to the State Department and Directorate of Defense Trade  
 18 Controls' regulation and enforcement actions regarding 3D-printed firearm files and the  
 19 Directorate's commodity jurisdiction determinations as to Defense Distributed's files, including but  
 20 not necessarily limited to the documents submitted with the Declaration of Lisa V. Aguirre in the  
 21 matter of *Defense Distributed v. U.S. Dep't of State*, Case No. 15-cv-372-RP (W.D. Tex.).

22        4.        Any and all other documents or evidence "before the decision-making body" when  
 23 the Federal Defendants decided to issue the July 27, 2018 Temporary Modification of Category I of  
 24

1 || the United States Munitions List and issue the July 27, 2018 Letter to Defense Distributed.

2       5. To the extent the Federal Defendants contend that any portion of the above is  
3 privileged or protected and thus exempt from disclosure, the Federal Defendants are ordered to  
4 submit a privilege log that complies with Federal Rule of Civil Procedure 26(b)(5)(A).

The Federal Defendants are ordered to complete a certified supplementation of the Administrative Record no later than 21 days following the issuance of this order. If any question about the completeness of the record or the reasons for the challenged agency actions remains after supplementation, the Court may order discovery to “obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.”” *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)).

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

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## UNITED STATES DISTRICT JUDGE

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1                   **DECLARATION OF SERVICE**

2                   I hereby certify that on November 15, 2018, I caused the foregoing document to be  
3 electronically filed with the Clerk of the Court using the CM/ECF system, which will serve a  
4 copy of this document upon all counsel of record.

5                   DATED this 15th day of November, 2018, at Seattle, Washington.

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7                   */s/ Jeffrey Rupert*  
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